



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
Determination of Need Program
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M E M O R A N D U M

TO: Interested Parties

FROM: Bernard Plovnick, Director, Determination of Need Program

DATE: October 24, 2014

RE: Determination of Need Transfer of Site Procedures under 105 CMR 100.720

The Massachusetts Department of Public Health (DPH) is notifying all current and prospective licensees contemplating the relocation of a facility or healthcare service subject to Determination of Need (DoN) regulation that any request for transfer of site must be submitted pursuant to 105 CMR 100.720, except in the limited situation identified below. This guidance on transfer of site is consistent with the purpose and objective of the DoN regulation, which provides, in part, that the "objective of the determination of need process shall be the allocation of health care resources and the improvement of health care delivery systems such that adequate health care services are made reasonably available to every person within Massachusetts at the lowest reasonable aggregate cost and to ensure the non-duplication of services." 105 CMR 100.001.

1. Transfer of Site of Long Term Care Beds

Any transfer of site of long-term care beds, whether currently in service or out-of-service, is subject to review and DoN approval pursuant to 105 CMR 100.720(I)(3). This application of 105 CMR 100.720 does not otherwise limit other DoN requirements including, where applicable, DoN requirements for projects that involve a substantial change in service or substantial capital expenditure. No long-term care beds may be transferred in Massachusetts after the date of this memorandum except in accordance with 105 CMR 100.720.

2. Transfer of Site of All Other DoN-Regulated Services

Any transfer of site of a DoN-regulated service or device is subject to review and DoN approval pursuant to 105 CMR 100.720, except for transfers that DPH determines to be within a *de minimus* distance of the licensee's existing campus or site. The Department will consider that a move is *de minimus* if it meets the same test for proximity to the existing site as that specified at 105 CMR 130.122(E)(2) regarding closure of an essential service by a hospital:

. . . providing the same service(s), without interruption, to the same patient population at a new site that is located within the same zip code area, or within a five mile radius of the location or equivalent driving distance, where service(s) are being discontinued.

Any entity seeking to transfer a DoN-regulated service or device in accordance with this exception must submit a request to the DoN Program Director at least 90 days prior to any such planned transfer for determination whether the exception applies. The practice known as “virtual” or “flexible” campus does not apply to any transfer of site of a facility or service subject to DoN regulation except in the limited situation identified above. No DoN-regulated service or device may be transferred in Massachusetts after the date of this memorandum except in accordance with 105 CMR 100.720 and this guidance.

Please direct any questions about this memorandum to me at 617-624-5690 or bernard.plovnick@state.ma.us.

For reference, 105 CMR 100.720 is appended to this document.

August 1, 2014

Disclaimer: Please be advised that the following does not constitute the official version of this regulation. As is the case with all state regulations, official versions are available from the Secretary of the Commonwealth's State Publications and Regulations Division, through the State Bookstore. For the official version, contact the State Bookstore in Boston at (617) 727-2834.

100.720: Transfer of Site Procedures

Subject to the following standards and procedures, the Department shall grant a transfer of site for any project approved under 105 CMR 100.530 or a change in location (premises) for any duly licensed health care facility, provided that any such change in location(s) of a duly licensed hospital other than an acute care hospital may be granted for a number of licensed beds that is no greater than the maximum number of beds that have been in service pursuant to 105 CMR 130.000 for the period six months prior to the date the request is filed with the Department, and provided further, that any series of such changes in location of licensed beds may not result in a total number of beds that exceeds the total number of beds in service at the time of the first transfer of site. A transfer granted to a licensed health care facility pursuant to 105 CMR 100.720 or pursuant to 105 CMR 100.754 shall constitute a determination of need for the purpose of original licensure pursuant to M.G.L. c. 111, §§ 51 through 52.

(A) The holder of the determination of need or licensee shall submit a written request for transfer of site to the Program Director and shall simultaneously file by certified mail, return receipt requested, or by hand delivery, one copy each to the Department of Elder Affairs if relevant pursuant to 105 CMR 100.152, and the Department of Mental Health if relevant pursuant to 105 CMR 100.153. The request shall contain at least the following information:

(1) A brief description of the current and proposed new site including a comparison of the area (gross square feet) associated with licensed services in both sites, the current and proposed service area, and the reasons for the request;

Licensees of long term care facilities:

(a) whose facilities are currently located in an underbedded urban area, as defined in Department guidelines and that meet the criteria in 105 CMR 100.535(D); and

(b) who are unable to secure a suitable site for transfer in the urban area, shall provide written documentation of the unavailability of a site within the city or town.

(2) A signed affidavit of truthfulness and proper submission, in accordance with 105 CMR 100.324;

(3) A detailed statement of all expenditures to be incurred as a result to the transfer of site and, in the case of an approved project not yet licensed by the Department (or not yet in operation if no license by the Department is required), an itemized statement detailing the effect of the site transfer upon the approved maximum capital expenditure; and

(4) In the case of an approved project not yet licensed by the Department (or not yet in operation if no license by the Department is required), documentation of sufficient interest in the proposed site and evidence that the site may be used for the proposed purpose, in accordance with 105 CMR 100.306.

(B) An applicant for transfer of site shall cause notice of its request to be published prior to the

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filing of such request in conformance with 105 CMR 100.330 and 105 CMR 100.331(A). The notice shall identify the applicant by name and address, the name of existing and proposed addresses of the health care facility involved, the date on which the request will be filed, and shall contain the following statement: "Persons who wish to comment on the proposed transfer must submit written comments within 20 days of the filing date of the request to the Department of Public Health, Attention: Program Director, Determination of Need Program, (at its current address). The request for transfer of site may be inspected at such address." No request for transfer of site shall be accepted for filing unless the applicant submits an affidavit of publication in conformance with 105 CMR 100.332 to the Program Director and to the Attorney General.

(C) Persons who wish to comment on the proposed transfer must submit their comments, in writing, to the Program Director within 20 days of the filing date of the request.

(D) The Program Director shall be authorized to obtain whatever additional information he or she may deem necessary.

(E) The Program Director shall take no action for 20 days after the submission of a complete request under 105 CMR 100.720. If no comments objecting to the transfer are filed within the 20 day period, the Program Director shall be authorized to approve the request so long as it meets the requirements of 105 CMR 100.720(H) and 100.720(I). The Program Director may approve the request subject to reasonable conditions related to the proposed transfer of site or change in location.

(F) If objections are filed within the 20 day period, or if the Program Director proposes to deny the request, the Program Director shall send notice to the person requesting the transfer, the persons identified in 105 CMR 100.720(A), and the persons who commented pursuant to 105 CMR 100.720(C), at least seven days in advance of the date of the Department meeting at which the request will be considered. The Department shall afford the person requesting the transfer and the other persons the opportunity to make brief a presentation to the Department prior to acting upon the request.

(G) Except as provided in 105 CMR 100.720(H) and 100.720(I), the Department shall grant a request for transfer of site or change in location unless it finds that transfer of the project or facility to the site proposed would likely violate the objectives of the determination of need process stated at 105 CMR 100.001. The Department may approve the request subject to reasonable conditions related to the proposed transfer of site or change in location.

(H) With respect to a project approved pursuant to 105 CMR 100.530 and not yet licensed (or not yet in operation, if no license by the Department is required), a request for a transfer of site under 105 CMR 100.720 shall be approved if the Department determines that no substantial change in service or substantial capital expenditure will result and one of the following applies:

- (1) The proposed transfer will not substantially change the population served by the facility defined as the population residing in the cities and towns whose patients when ranked ordinarily contribute cumulatively 75% of the facility's total discharges; provided that the

transfer of site request shall not be approved if the proposed site of the transfer is a city or town that ranks higher on the 75% discharge list of another facility that provides the same services than it does on the 75% list of the facility proposing the transfer, unless there has been demonstration that the proposed transfer will not result in the duplication of services; or

(2) The proposed transfer will significantly increase access to the service for the population residing in the cities and towns of the new site, and will not result in a corresponding decrease in access to the service at the original site; or

(3) For a long term care project, the proposed transfer will not result in relocation of more than 25 miles from the original approved site, unless it has been demonstrated that access to services will be significantly improved, and will not result in a corresponding decrease in access to the service at the original site.

(I) With respect to a facility duly licensed pursuant to M.G.L. c.111, §§ 51 through 53, a request for a transfer of site under 105 CMR 100.720 shall be approved if the Department determines that no substantial change in service or substantial capital expenditure will result and one of the following applies:

- (1) The proposed transfer will not substantially change the population served by the facility, defined as the population residing in the cities and towns whose patients when ranked ordinarily contribute cumulatively 75% of the facility's total discharges; provided that the transfer of site request shall not be approved if the proposed site of the transfer is a city or town that ranks higher on the 75% discharge list of another facility that provides the same services than it does on the 75% list of the facility proposing the transfer, unless there has been demonstration that the proposed transfer will not result in the duplication of services; or;
- (2) The proposed transfer will significantly increase access to the service for the population residing in cities and towns of the new site, and will not result in a corresponding decrease in access to the service at the original site; or
- (3) For a long term care facility, the proposed transfer will not result in a change in the service area of the facility as defined by 105 CMR 100.535, or if the proposed transfer is outside the service area of the facility will significantly increase access at the new site, and will not result in a corresponding decrease in access to the service at the original site.